



STATE BOARD OF EQUALIZATION STAFF LEGISLATIVE BILL ANALYSIS

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| Date Amended: | 05/26/05 | Bill No: | AB 178 |
| Tax: | California Cigarette Fire Safety | Author: | Koretz, et. al. |
| Related Bills: | | | |

This analysis will only address the bill's provisions that impact the Board.

BILL SUMMARY

Among other things, this bill would authorize an employee of the Board of Equalization (Board), upon presentation of the appropriate identification and credentials, to inspect cigarette packaging to ensure they are marked to indicate compliance with the requirements of the Cigarette Fire Safety and Firefighter Protection Act (Act).

Summary of Amendments

Among other things, the previous version of this bill prohibited a person from affixing a cigarette tax stamp to a package of cigarettes that was not marked to indicate compliance with the Act, required the Board to approve or disapprove a manufacturer's marking, and required the Board to collect and deposit specified penalties in the Cigarette Fire Safety and Firefighter Protection Fund.

ANALYSIS

Current Law

Under existing law, the Board administers the **Cigarette and Tobacco Products Tax Law**. An excise tax of \$0.87 per package of 20 cigarettes is imposed on the distribution of cigarettes in this state.

Section 30435 of the Cigarette and Tobacco Products Tax Law authorizes an employee of the Board, upon presentation of the appropriate identification and credentials, to enter into, and conduct an inspection of, any of the following:

- Any building, facility, site, or place at which cigarette or tobacco products are sold, produced, or stored; or
- Any building, facility, site, or place for which there is evidence of either the evasion of the cigarette or tobacco products taxes, or the failure to comply with the requirements of the Master Settlement Agreement, as defined.

Any inspection performed must be performed in a reasonable manner and at a reasonable time, taking into consideration the normal business hours of the building,

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facility, site, or place that is inspected. Any person that refuses to allow an inspection is subject to a fine not to exceed one thousand dollars (\$1,000) for each offense.

Section 30436 authorizes the Board to seize cigarettes and tobacco products under specified conditions, which includes, but is not limited to, cigarettes not contained in packages to which the California cigarette tax stamp is affixed or tobacco products upon which the surtax has not been paid. Upon seizure, those items become the property of the state.

Upon the administrative seizure and forfeiture of cigarettes, the Board is required to give notice to all persons known by the Board to have any right, title or interest in the property. In addition, notice of seizure and forfeiture must be given on the Board's Web site, as specified, if the seizure involves 61 cartons of 200 or more cigarettes.

Any person owning or claiming any interest in the cigarettes may file a verified petition with the Board stating his or her interest in the property and requesting the release or recovery of the property on the grounds that property was erroneously or illegally seized. The petition must be filed within 20 days from the date of the personal service upon him or her or the date of the mailing of the notice. Any person not served personally or by mail, however, must file the petition within 20 day from the date of publication of the notice. The failure of any such person to file a timely verified petition constitutes a bar to his or her right to any interest in the property, unless otherwise provided.

Petitions for release or recovery of seized cigarettes generally appear before the Board by the next scheduled Board Meeting if the 20-day petition period has elapsed. At that point, the Board determines whether the cigarettes were erroneously or illegally seized. If the Board finds that the cigarettes were erroneously or illegally seized, it is required under current law to order the release of the property. However, if the Board denies the petition for the release or recovery of the property, notice of the denial is mailed (within five days) to the petitioner and the Board then destroys the seized cigarettes.

The Board also administers the **Cigarette and Tobacco Products Licensing Act of 2003** (Licensing Act), which requires the licensure of cigarette and tobacco products distributors, wholesalers and retailers, and cigarette manufacturers and importers.

The Licensing Act authorizes any peace officer, or Board employee granted limited peace officer status, upon presenting appropriate credentials, to enter any place, as described, and to conduct inspections. Such inspections must be conducted in a reasonable manner and at times that are reasonable under the circumstances, taking into consideration the normal business hours of the place to be entered, and must be requested or conducted no more than once in a 24-hour period. Any person that refuses to allow an inspection is subject to a misdemeanor, punishable by a fine not to exceed five thousand dollars (\$5,000), or imprisonment not exceeding one year in a county jail, or both the fine and imprisonment.

The Board also has the authority to seize cigarettes and tobacco products under the Licensing Act. With the exception of cigarettes and tobacco products seized and forfeited for continued sales after notification of suspension or revocation, the seizure

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and forfeiture of such products under the Licensing Act must comply with the seizure and forfeiture procedures set forth in the Cigarette and Tobacco Products Tax Law.

Proposed Law

This bill would add Part 8 (commencing with Section 14950) to Division 12 of the Health and Safety Code as the California Cigarette Fire Safety and Firefighter Protection Act (Act).

CERTIFICATION, TESTING AND MARKING

This bill would require each cigarette manufacturer to submit a written certification to the Attorney General and the Bureau of Home Furnishings and Thermal Insulation in the Department of Consumer Affairs (Bureau) attesting that each cigarette listed in the certification:

- Has been tested in accordance with the American Society of Testing and Materials standard E2187-04, "Standard Test Method for Measuring the Ignition Strength of Cigarettes," and
- Meets the specified performance standards.

Cigarettes certified by a manufacturer would require a marking on the packaging to indicate compliance. The marking would be required to be in 8-point type or larger and consist of one of the following:

- Modification of the Universal Product Code to include a visible mark printed at or around the area of that code. The mark may consist of alphanumeric or symbolic characters permanently stamped, engraved, embossed or printed in conjunction with the Universal Product Code.
- Any visible combination of alphanumeric or symbolic characters permanently stamped, engraved, or embossed upon the cigarette packaging or cellophane wrap.
- Printed, stamped, engraved, or embossed text on the cigarette packaging that indicates that the cigarettes meet California standards.

The Bureau would approve or disapprove the marking offered by a manufacturer, as described. A manufacturer would only be allowed to use one marking and apply that marking uniformly for all packaging, including, but not limited to, packages, cartons, and cases, and brands marketed by that manufacturer. A manufacturer would not be allowed to modify its approved marking unless approved by the Bureau, as specified.

GENERAL REQUIREMENTS

This bill would prohibit a person from selling, offering, or possessing for sale in this state cigarettes not in compliance with the following requirements:

- The cigarettes are tested by the manufacturer in accordance with the prescribed test method.
- The cigarettes meet the performance standard, as specified.

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- The cigarettes meet the marking requirement.
- The manufacturer files a written certification with the Attorney General.

Distributors, wholesalers, or retailers would not be prohibited from selling their inventory of cigarettes existing on January 1, 2006, if the distributors, wholesalers, or retailers can establish that California tax stamps or meter impressions were affixed to the cigarettes before January 1, 2006, or the distributors, wholesalers, or retailers can establish that the inventory was purchased before January 1, 2006, in comparable quantity to the inventory purchased during the same period of 2005.

In addition, a person or entity would not be prohibited from manufacturing or selling cigarettes if the cigarettes are or will be stamped or metered for sale in another state or are packaged for sale outside the United States.

PENALTIES

Any manufacturer, distributor, wholesaler, or any other person or entity that knowingly sells or offers to sell cigarettes other than through retail sale in violation of the Act would be subject to a civil penalty not to exceed ten thousand dollars (\$10,000) for each sale.

Any retailer that knowingly sells or offers to sell cigarettes in violation of this part would be subject to the following:

- A civil penalty not to exceed five hundred dollars (\$500) for each sale or offer for sale in which the total number of cigarettes sold or offered for sale does not exceed 50 packages of cigarettes.
- A civil penalty not to exceed one thousand dollars (\$1,000) for each sale or offer for sale in which the total number of cigarettes sold or offered for sale exceeds 50 packages of cigarettes.

The civil penalties would be deposited in the Cigarette Fire Safety and Firefighter Protection Fund.

In addition to any other penalty prescribed by law, any corporation, partnership, sole proprietor, limited partnership, or association engaged in the manufacture of cigarettes that knowingly makes a false certification would be subject to a civil penalty not to exceed ten thousand dollars (\$10,000) for each false certification.

Any person violating any other provision in this part would be subject to a civil penalty not to exceed one thousand dollars (\$1,000) for each violation. Any cigarettes that have been sold or offered for sale that do not comply with the performance standard would be deemed contraband and subject to seizure and disposal by the Board.

It would be a defense in any action for civil penalties that a distributor, wholesaler, retailer, or any person in the stream of commerce relied in good faith on the manufacturer's marking that the cigarettes comply with the requirements of the Act.

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ENFORCEMENT

Manufacturers, distributors, wholesalers, and retailers would be required to permit an employee of the Board, upon presentation of the appropriate identification and credentials, to inspect cigarette packagings to ensure they are properly marked.

Any person that refuses to allow an inspection would be subject to a civil penalty not to exceed one thousand dollars (\$1,000) for each failure or refusal.

The May 4, 2005, version of the bill would have prohibited a person from affixing, or causing to be affixed, a tax stamp or meter impression to a package of cigarettes if the package does not comply with the marking requirement. While the amendments delete that prohibition, the Board would still be required to seize all cigarettes in the possession of the person in violation of that deleted prohibition. Any cigarettes seized by the Board would be deemed forfeited.

The Act would cease to be applicable if federal fire safety standards for cigarettes that preempt this Act are enacted and take effect subsequent to the effective date of this act and the Board so notifies the Secretary of State.

FINANCIAL PROVISIONS

This bill would create the Cigarette Fire Safety and Firefighter Protection Fund in the State Treasury. Upon appropriation by the Legislature, moneys deposited into that fund would be made available to the following:

- The Board to offset minor administrative costs for inspecting, seizing, and disposing of cigarettes.
- The Bureau to offset minor administrative costs associated with implementation of the Act.

DEFINITIONS

This bill would define the following terms:

- "Cigarette" - a cigarette as defined in Section 30003 of the Revenue and Taxation Code.
- "Distributor" - a distributor as defined in Section 30011 of the Revenue and Taxation Code.
- "Manufacturer" - any of the following:
 - An entity that manufactures or otherwise produces cigarettes or causes cigarettes to be manufactured or produced anywhere that manufacturer intends to be sold in the state, including cigarettes intended to be sold in the United States through an importer.
 - The first purchaser anywhere that intends to resell in the United States cigarettes manufactured anywhere that the original manufacturer or maker does not intend to be sold in the United States.
 - An entity that becomes a successor of an entity, as described.

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- "Offer to sell" - to offer or agree to sell.
- "Package" - package as defined in Section 30015 of the Revenue and Taxation Code.
- "Retailer" - a person who engages in the sale of cigarettes, but not for the purpose of resale.
- "Sale" or "sell" - any transfer, exchange, or barter, in any manner or by any means whatever, or any agreement for these purposes. The giving of cigarettes as samples, prizes, or gifts, and the exchanging of cigarettes for any consideration other than money are considered sales.
- "Stamp and meter impression" - stamp and meter impression as defined in Section 30018 of the Revenue and Taxation Code.
- "Wholesaler" - a wholesaler as defined in Section 30016 of the Revenue and Taxation Code.

The bill would become effective January 1, 2006.

COMMENTS

1. **Sponsor and purpose.** This bill is sponsored by the author and is intended to increase the safety of cigarettes sold in California by prohibiting sales of cigarettes that do not meet established fire safety standards. This bill is modeled on a New York State law that became effective in June 2004. According to the National Fire Protection Association (NFPA), cigarettes are the leading cause of fire-related injuries and death nationwide. Each year 1,000 people die and another 4,000 are injured in cigarette-related fires.
2. **Is the Board's inspection and seizure authority consistent with violations of the Act?** This measure would prohibit a person from selling, offering, or possessing for sale in this state cigarettes not in compliance with the testing, performance standard, marking, and certification requirements. However, the Board's authority to inspect and seize cigarettes is not consistent with the prohibition. For example, Board employees would only be authorized to conduct inspections to ensure cigarette packaging is marked to indicate compliance with the Act. What if a package of cigarettes is marked, but that brand and style is not in compliance with the testing, performance and certification requirements? Would the Board have the authority to seize the product not in compliance with the testing, performance and certification requirements if the inspection authority is limited to the inspection of markings?

In addition, the Board's seizure authority is limited to cigarettes that do not comply with the performance standard, and cigarettes that are affixed tax stamps or meter impressions that are in violation of a prohibition that was removed from the bill. As such, the Board could not seize cigarettes that do not meet the certification or marking requirements. The following language is suggested to clarify the Board's authority:

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14955. (e) Any person violating any other provision in this part shall be subject to a civil penalty not to exceed one thousand dollars (\$1,000) for each violation. ~~Any cigarettes that have been sold or offered for sale that do not comply with the performance standard required by Section 14952 shall be deemed contraband and subject to seizure and disposal by the board.~~

14956. (a) Manufacturers, distributor, wholesalers, and retailers shall permit an employee of the board, upon presentation of the appropriate identification and credentials, to enter into, and to conduct an inspection of any building, facility, site, or place described in subdivision (c). ~~inspect cigarettes to ensure they are not in violation of 14951.~~

(c) Inspections may be at any place cigarettes are sold, offered for sale or possessed, or at any site where there is evidence of a violation of Section 14951(a).

14957. Upon discovery by the board or a law enforcement agency that any person offers or possesses for sale, or has made a sale of cigarettes in violation of subdivision (a) of Section 14951, the board or that law enforcement agency shall be authorized to seize all cigarettes in violation of subdivision (a) of Section 14951. Cigarettes to which are affixed tax stamps or meter impressions in violation of subdivision (a) of Section 14951 shall result in the seizure by the board of all cigarettes in the possession of the person in violation of this part. Any cigarettes seized by the board shall be deemed forfeited.

3. **Should the Bureau maintain an online directory of certified cigarettes by manufacturer?** This bill would require manufacturers certifying cigarettes to provide a copy of the certifications to all distributors and wholesalers to which they sell cigarettes. Manufacturers would also be required to provide sufficient copies of an illustration of the cigarette packaging marking utilized by the manufacturer for each retailer to which the distributors and wholesalers sell cigarettes.

Consideration should be given to replace the requirement of providing copies with a requirement that the Bureau post on its Web site cigarettes certified by the manufacturer, as well as an illustration of the marking utilized by the manufacturer that was approved by the Bureau. This suggestion would provide manufacturers, distributors, wholesalers with an efficient manner to verify certified cigarettes and approved markings, as well as provide Board staff the information necessary to conduct inspections of cigarettes to ensure compliance with the Act. Without an online directory, a provision should be added to the bill to require the Bureau to promptly notify the Board of cigarettes certified by a manufacturer and provide illustrations of approved markings, as well as any updates to such certifications or markings.

4. **What agency is responsible for the collection of penalties?** This measure would impose civil penalties upon persons that knowingly sells or offers to sell cigarettes in violation of the Act, are engaged in the manufacture of cigarettes that knowingly make a false certification would also be subject to a civil penalty, or are in violation

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of any other provision of the Act. In addition, any person who knowingly fails or refuses to allow an inspection by the Board would be subject to a civil penalty for each failure or refusal. However, this measure does not specify an agency responsible for the collection of the penalties imposed. Based on discussions with the author's office, staff understands that collection would be administered by an agency other than the Board.

5. **Could inspections be conducted concurrently with the Board's current inspection program?** The inspections provided under this bill would be conducted at the same time as inspections under the Cigarette and Tobacco Products Tax Law and Licensing Act since both involve the examination of packages of cigarettes. As such, the provisions of this bill that authorize the Board to conduct inspections to ensure compliance with the Act, and to seize cigarettes in violation of the Act, would not be problematic to administer.
6. **Suggested technical amendment.** This bill would cease to be applicable if federal fire safety standards for cigarettes that preempt this Act are enacted and take effect subsequent to the effective date of this Act and the Board so notifies the Secretary of State. The bill should be amended to require the Bureau, rather than the Board, be responsible for the notification to the Secretary of State.

COST ESTIMATE

The Board would incur costs to seize and destroy cigarettes that are in violation of the Act. A detailed cost estimate of this workload is pending; however, it is estimated that such costs would be minor (over \$10,000 and under \$50,000).

REVENUE ESTIMATE

The provisions of this bill could have a negative impact on the state excise tax collected on sales of cigarettes and also on sales and use taxes collected if consumers quit smoking or begin to purchase cigarettes from out-of-state sellers as a result of this bill. However, the Board has no way of measuring the potential impact this bill may have, and therefore, cannot provide an estimate at this time.

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